EXHIBIT H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

ISABEL ZELAYA, et al.,	)	
	)	
Plaintiff,	)	
	)	No. 3:19-CV-00062-PLR-HBG
v.	)	
	)	
JERE MILES, et al.,	)	
	)	
	)	
Defendants.	)	

DEFENDANT JERE MILES' RESPONSE TO PLAINTIFFS' MOTION FOR LEAVE TO TAKE EXPEDITED DISCOVERY

Defendant Jere Miles, by and through J. Douglas Overbey, United States Attorney for the Eastern District of Tennessee, hereby responds to Plaintiffs' Motion for Leave to Take Expedited Discovery (Doc. 9).[1] In support of this response, Defendant Miles relies on his declaration, attached hereto as Exhibit 1, and on the record as a whole. For the reasons that follow, Plaintiffs' motion should be denied.

[1] This response is not a responsive pleading to the Complaint and should not be deemed as such. *See PNC Sec. Corp. v. Finanz-Und GmbH-Liedgens*, 101 F.3d 702, 1996 WL 665574, at *6 (6th Cir. Nov. 14, 1996) (noting in the context of Rule 15's use of the phrase "responsive pleading" that "[c]ases uniformly hold that a 'responsive pleading' is solely one of the pleadings mentioned in Rule 7(a)" and holding that a response to a garnishment was not a responsive pleading). A response to a motion for expedited discovery is not included in Rule 7(a), and the Court's local rules require a response to the motion before Defendant Miles is required to file a responsive pleading to the Complaint. Accordingly, any and all defenses are hereby preserved and are not waived.

I.

LEGAL ARGUMENT

Plaintiffs seek an order directing Defendant Miles to respond to two interrogatories that are supposedly aimed at identifying the Doe Defendants referenced in the Complaint. Those two interrogatories state as follows:

> Please IDENTIFY all OFFICERS AND/OR EMPLOYEES of [Department of Homeland Security ("DHS")] who participated in and/or were present during the execution of an Internal Revenue Service ("IRS") search warrant on April 5, 2018 at the Southeastern Provision meat packing plant in Bean Station, Tennessee.
>
> . . . .
>
> Please IDENTIFY all SUPERVISORS at DHS who participated in any manner in planning and/or approving any of the DHS OFFICERS AND/OR EMPLOYEES's actions during the execution of an IRS search warrant on April 5, 2018 at the Southeastern Provision meat packing plant in Bean Station, Tennessee.

(Doc. 10-1, Interrogs., PageID# 160.) The definition of the term "identify" includes "[a]ll known telephone numbers" and "[a]ll known addresses." (*Id*., PageID# 157-58.)

While Plaintiffs claim that these interrogatories are "narrowly-tailored" and "will very likely yield the identities of the Doe Defendants" (Doc. 10, Mem. in Supp. of Mot. for Expedited Disc., PageID# 145), that is not the case. Since this action involves the large-scale execution of a federal search warrant, such a broad list of people "who participated in and/or were present during the execution" or "who participated in any manner in planning and/or approving any of the . . . actions during the execution" will not connect any particular person identified to any particular act alleged in the Complaint. (Doc. 10-1, Interrogs., PageID# 160.) Instead, Plaintiffs should be seeking only the identities of the individuals actually referenced in the Complaint, such as those whose actions are specified in the Complaint and accompanied by physical

descriptions of such actors. (*See, e.g.*, Doc. 1, Compl., PageID# 21 (¶¶ 135-37), 23 (¶ 155), 28 (¶ 189), 29 (¶ 198).) As proposed, these interrogatories are basic discovery requests for potential witnesses or persons with knowledge, not potential defendants answerable for the specific factual allegations and *Bivens* claims asserted in the Complaint. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1860 (2017) (stating that "a *Bivens* claim is brought against the individual official for his or her own acts, not the acts of others" because "[t]he purpose of *Bivens* is to deter the *officer*").[2]

Further, Plaintiffs have directed their interrogatories to Defendant Miles, claiming that he was the Special Agent in Charge of the execution of the federal search warrant. (Doc. 10, Mem. in Supp. of Mot. for Expedited Disc., PageID# 145.) But, that is not so. On April 5, 2018, Defendant Miles was the Deputy Assistant Director, Division 4, Investigative Programs, Homeland Security Investigations ("HSI"), in Fairfax, Virginia. (Miles Decl., Ex. 1 ¶ 2.) He was not present for the execution of the warrant, and he did not participate in the criminal investigation, planning, or execution of the warrant in any way. (*Id*. ¶¶ 3-4.) Not surprisingly, Plaintiffs' Complaint does not allege any specific action by Defendant Miles.

Defendant Miles is not even a proper defendant in this action. First, the Court lacks personal jurisdiction over Defendant Miles because Defendant Miles does not have any relevant

[2] Furthermore, "*Bivens* is not designed to hold officers responsible for acts of their subordinates" and "a *Bivens* action is not a proper vehicle for altering an entity's policy." *Ziglar*, 137 S. Ct. at 1860 (internal quotation marks omitted). And, the Complaint does not state a claim for conspiracy under 42 U.S.C. § 1985 because of the intracorporate-conspiracy doctrine and/or the qualified-immunity defense. *See id*. at 1867-69 (discussing these principles and concluding that "[t]hese considerations suggest that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities" but "[w]hether that contention should prevail need not be decided" because "[i]t suffices to say that the question is sufficiently open so that the officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions"). If the claim under 42 U.S.C. § 1985 fails, then so does the claim under 42 U.S.C. § 1986. *Bishawi v. Northeast Ohio Corr. Ctr.*, 628 F. App'x 339, 346 (6th Cir. 2014).

contacts with Tennessee as they relate to Plaintiffs' cause of action. *See Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991) (noting that one of the criteria for determining whether the contacts are sufficient to comport with due process is that "the cause of action must arise from the defendant's activities [in the forum state]"). Defendant Miles certainly does not have the minimum contacts required to exercise jurisdiction. *See, e.g.*, *Gravely v. Fed. Bureau of Prisons*, No. 7:08-53-KKC, 2009 WL 2134137, at *3 (E.D. Ky. July 15, 2009) ("[T]his Court lacks personal jurisdiction over these [*Bivens*] Defendants, who were neither physically located in the Commonwealth of Kentucky nor directed their conduct towards the state. Because these defendants do not have any, let alone minimum, contacts with Kentucky required to establish personal jurisdiction under the Due Process Clause, the claims against them must be dismissed without prejudice.") (*citing Turner v. Ramirez*, 194 F.3d 1314 (6th Cir. 1999)).

Second, the Sixth Circuit "has consistently held that [*Bivens* claims] must allege, with particularity, facts that demonstrate what *each* defendant did to violate the asserted constitutional right." *Lanman v. Hinson*, 529 F.3d 673, 684 (6th Cir. 2008). Since the Complaint does not contain any specific allegations against Defendant Miles, he is entitled to qualified immunity, which "prevents government officials from being held liable if (1) the officers did not violate any constitutional guarantees or (2) the guarantee, even if violated, was not clearly established at the time of the alleged misconduct." *Arrington-Bey v. City of Bedford Heights, Ohio*, 858 F.3d 988, 992 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 738 (2018) (internal quotation marks omitted). The qualified-immunity defense also prevents Defendant Miles from being involved in discovery. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (stating that "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading

qualified immunity is entitled to dismissal before the commencement of discovery" because qualified immunity is "an *immunity from suit* rather than a mere defense to liability").[3]

Moreover, Plaintiffs have not sued the United States or any federal agency or even Defendant Miles in his official capacity. Rather, they have chosen to sue Defendant Miles in his individual capacity only. (*See* Doc. 1, Compl., PageID# 5 ("Defendant Miles is sued in his individual capacity.").) Yet, Plaintiffs are not seeking information from Defendant Miles in his individual capacity or based on his own personal knowledge. And, as described above, Defendant Miles has no personal knowledge because he was not involved in the execution of the warrant. (Miles Decl., Ex. 1 ¶¶ 2-4.) Instead, they are seeking information that they claim "is readily available to Defendant Miles in the form of payroll records or other . . . operation plans" ostensibly because he is employed by a sub-component of DHS. (Doc. 10, Mem. in Supp. of Mot. for Expedited Disc., PageID# 145.) In other words, Plaintiffs expect Defendant Miles to review documents and information in the possession and control of DHS – and, more specifically, Immigration and Customs Enforcement ("ICE") and HSI – and provide the information that he gains from that review to them in this action.

The manner in which Plaintiffs propose to ascertain the identities of the unnamed defendants is inappropriate for at least two reasons. First, Plaintiffs should seek information from DHS records from the United States (through its agencies) by serving third-party discovery, not from any individual employee, especially one who has no personal knowledge about the

[3] Defendant Miles intends to file a Rule 12 motion (in compliance with the Court's order regarding such motions) seeking his dismissal from this case based on the lack of personal jurisdiction, the qualified-immunity defense, Plaintiffs' failure to plead any factual allegations against him, and any other available defenses, which are preserved and not waived by or in this response. This response mentions the lack of personal jurisdiction and the qualified-immunity defense to point out additional reasons why the Court should not order Defendant Miles to respond to the expedited discovery that Plaintiffs have requested.

requested information. "Individual federal employees do not have custody or control over government documents." *Lopez v. Chertoff*, No. CV 07-1566-LEW, 2009 WL 1575209, at *3 (E.D. Cal. June 2, 2009). Therefore, Defendant Miles cannot be asked to produce the information that Plaintiffs are seeking. *Cf. id*. ("Moreover, Plaintiff sued Federal Defendants in their individual capacities, yet seeks to have them produce documents held by their employer, ICE. Plaintiff cannot use Rule 34 to discover matters from a nonparty. . . . As Federal Defendants' Counsel previously advised Plaintiff, he should have sought this information directly from ICE."). *See also Lowe v. Dist. of Columbia*, 250 F.R.D. 36, 39 (D.D.C. 2008) ("As a government employee, however, Payne's 'control' of documents created in the ordinary course of the government's business is secondary to that of his employer; he cannot on his own initiative remove government files and provide them to a third party. *Cf. United States ex. rel. Touhy v. Ragen*, 340 U.S. 462, 467 . . . (1951). Lowe must look to the District of Columbia for the production of Payne's files.").[4]

Second, Defendant Miles cannot provide any information from DHS files in this type of case without prior authorization from DHS. "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301. These regulations are known

[4] Plaintiffs reliance on *Ibarra v. City of Chicago*, 816 F. Supp. 2d 541 (N.D. Ill. 2011), is misplaced because the City of Chicago – the entity that actually possessed the information that the plaintiffs were seeking – was a party to the litigation. Here, Plaintiffs have not sued the United States, DHS, or any other federal entity, or any persons in their official capacity. And, although the expedited discovery requests in *Ibarra* are similar to the ones proposed here, *Ibarra* is factually distinguishable as it involved a single hit-and-run incident between a motorist and a bicyclist. 816 F. Supp. 2d at 545-46. It did not involve the large-scale execution of a federal search warrant as this case does.

as *Touhy* regulations as they were approved by the Supreme Court when it held that a federal employee could not be held in contempt for refusing to produce subpoenaed documents when his refusal was based on regulations prohibiting the disclosure of official information without prior authorization. *Touhy*, 340 U.S. at 468-70.

The *Touhy* regulations at issue here are codified at 6 C.F.R. § 5.41 through 6 C.F.R. § 5.49. They apply to:

> (1) Service of summonses and complaints or other requests or demands directed to the Department of Homeland Security (Department) or to any Department employee or former employee in connection with federal or state litigation arising out of or involving the performance of official activities of the Department; and
>
> (2) The oral or written disclosure, in response to subpoenas, orders, or other requests or demands of federal or state judicial or quasi-judicial or administrative authority as well as state legislative authorities (collectively, "demands"), whether civil or criminal in nature, or in response to requests for depositions, affidavits, admissions, *responses to interrogatories*, document production, interviews, or other litigation-related matters, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or applicable state rules (collectively, "requests"), of any material contained in the files of the Department, any information relating to material contained in the files of the Department, or any information acquired while the subject of the demand or request is or was employed by the Department, or served as Secretary of the Department, as part of the performance of that person's duties or by virtue of that person's official status.

6 C.F.R. § 5.41(a) (emphasis added). And, they specifically prohibit an employee from responding to a request for information without prior authorization. 6 C.F.R. § 5.44. Instead, the *Touhy* regulations provide a procedure for requesting information from DHS, 6 C.F.R. § 5.45, that should be followed in this case. *See Southeastern Pa. Transp. Auth. v. Orrstown Fin. Servs., Inc.*, No. 1:12-CV-00993, 2019 WL 568904, at *12 (M.D. Pa. Feb. 12, 2019) ("It is clear as a general matter that courts should deny a party's motion to compel disclosure of an agency's confidential supervisory information when a litigant fails to submit information

required by that particular agency's *Touhy* regulations.").[5] Instead, Plaintiffs are trying to circumvent the *Touhy* regulations and procedures by improperly seeking discovery through an individual federal employee who has not been authorized by DHS to provide any information from DHS's files to Plaintiffs. As the Supreme Court has made clear, Defendant Miles cannot be compelled to do so. *Touhy*, 340 U.S. at 468-70. *See also Boron Oil Co. v. Downie*, 873 F.2d 67, 69 (4th Cir. 1989) ("*Touhy* is part of an unbroken line of authority which directly supports [the] contention that a federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations.").

II.

CONCLUSION

For these reasons, Defendant Miles respectfully requests that the Court deny Plaintiffs' Motion for Leave to Take Expedited Discovery (Doc. 9).

Respectfully submitted,

J. DOUGLAS OVERBEY
United States Attorney

By: *s/ Kenny L. Saffles*
Kenny L. Saffles (BPR #023870)
Leah W. McClanahan (BPR #027603)
Assistant United States Attorney
800 Market Street, Suite 211
Knoxville, TN 37902
Kenny.Saffles@usdoj.gov
Leah.McClanahan@usdoj.gov
(865) 545-4167

[5] Plaintiffs' reliance on *Loeffler v. City of Anoka*, No. 13-CV-2060, 2015 WL 12977338 (D. Minn. Dec. 16, 2015), is also misplaced. In that case, the court allowed the plaintiff to conduct expedited discovery in the form of a third-party subpoena to the Minnesota Department of Public Safety to produce limited information concerning the ten times that a particular police department accessed the plaintiff's driver's-license information. 2015 WL 12977338, at *1-2 & n.2. Here, Plaintiffs have moved to serve expedited discovery on Defendant Miles, not to serve a subpoena on DHS.

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2019, the foregoing response was electronically filed. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All persons or parties who have made an appearance and are not on the electronic filing receipt will be served by regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

By: *s/ Kenny L. Saffles*
Kenny L. Saffles
Assistant United States Attorney